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No. 94-1267

In the Supreme Court of the United States

OCTOBER TERM, 1994

THOMAS C. PREVETIRE, PETITIONER

v.

WEYHER/LIVSEY CONSTRUCTORS, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether a pipefitter who works on the premises of a naval shipyard in the construction of a power plant intended to provide steam and electricity for shipbuilding and ship repair work at the shipyard is "engaged in maritime employment," and is therefore a covered employee under Section 2(3) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 902(3).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 27 F.3d 985. The decisions and orders of the Benefits Review Board (Pet. App. 16a-23a) and the administrative law judge (Pet. App. 24a-33a) are unreported.

JURISDICTION

The court of appeals entered its judgment on June 29, 1994. The court denied petitions for rehearing filed by petitioner and by the Director of the Office of Workers' Compensation Programs (OWCP) on October 26, 1994. Pet. App. 14a-15a. The petition for a writ of certiorari was filed on January 24, 1995. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Longshore and Harbor Workers' Compensation Act (LHWCA or Act), 33 U.S.C. 901 *et seq.*, provides compensation to employees who are injured while working on a maritime "situs," *i.e.*, on navigable waters and certain adjoining land areas, 33 U.S.C. 903(a), and who satisfy a "status" requirement of being an "employee," *i.e.*, a person engaged in "maritime employment." 33 U.S.C. 902(3); see *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 265 (1977). The LHWCA does not define "maritime employment," but it states that an "employee" "includ[es] any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker." 33 U.S.C. 902(3). Workers engaged in certain occupations are specifically excluded from coverage under the Act, if they are covered under a state workers' compensation law. 33 U.S.C. 902(3)(A)-(H); see 20 C.F.R. 701.301(a)(12).

2. Petitioner is a pipefitter who worked for respondent Weyher/Livsey Constructors, Inc., the general contractor on a project to build a power plant to replace an old plant at the Norfolk Naval Shipyard. Pet. App. 2a, 17a, 26a. Most of the steam and electrical power from the new plant was to be used for shipbuilding, ship repair operations, and administrative offices. *Id.* at 2a, 17a, 28a.

On October 16, 1986, in the course of his employment, petitioner injured the ring finger of his left hand. Pet. App. 17a-18a, 26a. He received benefits under a state workers' compensation law, and sought

additional compensation under the LHWCA.[1] Weyher/Livsey and its insurer, respondent Wausau Insurance Company, conceded that Prevetire had suffered a work-related injury, but denied that he was covered by the LHWCA. *Id.* at 18a, 26a.

3. An administrative law judge (ALJ) held that the shipyard where petitioner was injured was a maritime "situs," but denied benefits on the ground that petitioner was not engaged in "maritime employment." Pet. App. 29a-33a. The ALJ reasoned that, as petitioner was a land-based worker, his employment had to have a "realistically significant relationship" to "traditional maritime activity" to qualify for coverage under the Act. *Id.* at 32a. Petitioner failed that test, the ALJ concluded, because there was "nothing uniquely maritime" about his pipefitting work. *Ibid.*

4. The Benefits Review Board reversed. Pet. App. 16a-23a. The Board concluded, in light of this Court's decision in *Chesapeake & Ohio Railway Co.* v. *Schwalb*, 493 U.S. 40 (1989), that the proper status inquiry is not whether petitioner was engaged in a "traditional maritime activity," nor whether petitioner's employment was "inherently maritime,"

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[1] Petitioner suffered a "schedule" injury that would have entitled him to 25 weeks of LHWCA compensation at the rate of two thirds of his average weekly wage, proportionately reduced to reflect the 22% impairment to his ring finger. See 33 U.S.C. 908(c)(10) and (19); Pet. App. 26a. That recovery would have been reduced by the amount of his state workers' compensation award, 33 U.S.C. 903(e); Pet. App. 26a, which was less than the LHWCA award. See Va. Code Ann. § 65.2-503B.4 and D (Michie 1991) (20 weeks of compensation at two thirds of employee's average weekly wage, proportionately reduced to reflect degree of impairment).

but whether petitioner's employment was "essential" to the shipbuilding or ship repair operation. Pet. App. 19a-20a. Applying that test, the Board held that petitioner was covered under the Act because "[t]he construction of a power plant at the shipyard is essential to the shipyard's operation, for without electricity and steam no shipbuilding and repair work can be performed." *Id.* at 20a-21a. The Board also viewed petitioner's work as "just as essential" to the shipbuilding and ship repair process as covered "maintenance and repair of the machinery used in the shipbuilding process." *Id.* at 21a (citing, *inter alia*, *Graziano* v. *General Dynamics Corp.*, 663 F.2d 340, 342-343 (1st Cir. 1981)).[2]

5. The court of appeals reversed, concluding that petitioner was not covered by the Act because he was not engaged in maritime employment. Pet. App. 1a-11a. The court recognized that the Director of the Office of Workers' Compensation Programs (OWCP), who represented the Department of Labor in the court of appeals, see 20 C.F.R. 802.410(b), and who agreed with the Board's decision that petitioner was covered, was entitled to deference in her interpretation of "maritime employment." Pet. App. 4a. The court nevertheless rejected the Director's interpretation, believing it to be "both unreasonable and contrary to Congress' clear intent, as expressed in the Act's text and structure." *Id.* at 5a. The court acknowledged, however, that the text of the Act sets

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[2] Administrative Appeals Judge Dolder dissented in part, stating that, although the ALJ had applied the wrong test, the case should be remanded for the ALJ to apply the proper test to the facts of this case. Pet. App. 22a-23a.

forth "no general definition of 'maritime employment.'" *Id.* at 7a.

To support its narrower construction of the Act's coverage, the court of appeals stressed that this Court had "repeatedly held" that land-based activity will be considered maritime employment covered under the Act "only if it is an integral or essential part of loading or unloading a vessel." Pet. App. 7a (quoting *Schwalb*, 493 U.S. at 45-46) (emphasis omitted). The court of appeals believed that *Schwalb*, which had found coverage for persons engaged in the repair and maintenance of machinery used to load and unload ships (see 493 U.S. at 47), could not be extended to the case of a pipefitter "employed in only the construction of a power plant (as distinguished from its later operation or maintenance) * * * simply because the power plant being built would eventually provide steam and electricity to shipbuilding and ship-repair operations." Pet. App. 8a (emphasis omitted). The court also expressed the view that petitioner's claim to coverage was even weaker than the claim of the offshore fixed-platform construction worker rejected in *Herb's Welding, Inc.* v. *Gray*, 470 U.S. 414 (1985), because petitioner's duties were "far removed from traditional LHWCA activities, such as longshoring," and did not involve "an inherently maritime task." Pet. App. 9a.

Judge Sprouse dissented. Pet. App. 11a-13a. He concluded that petitioner's construction work was covered under the Act because it was as essential to shipbuilding and ship repair as the maintenance and repair work by the covered claimant in *Schwalb* had been to loading and unloading cargo. *Id.* at 11a-12a. He also distinguished *Herb's Welding* because none of the offshore oil activities in that case had any

relation "to one of the Act's primary purposes—the protection of shipyard workers whose activities affect the loading or unloading of ships" (*id.* at 12a), whereas, in this case, petitioner's work of furnishing electrical power was closely related to maritime work in the shipyard. *Ibid.* Judge Sprouse criticized the majority for not deferring to the Director, who had maintained since 1977 that the kind of construction work involved in this case is covered "maritime employment." *Ibid.*

The court of appeals subsequently denied rehearing en banc, with four judges dissenting. Pet. App. 14a-15a.

ARGUMENT

The court of appeals misunderstood this Court's decisions to hold that land-based employees cannot be engaged in "maritime employment" under the LHWCA unless their work is essential to only one kind of maritime employment, the loading and unloading of vessels. Based largely on that error, the court then denied coverage to a worker who, under the Director's interpretation of the Act, should have been granted coverage because he performed work that was essential to other kinds of maritime employment—namely, shipbuilding and ship repair.

Although the court of appeals' decision is in some tension with decisions of this Court, it is not directly contrary to any specific holding. Moreover, although there is a divergence of views in the courts of appeals on the scope of covered "maritime employment" under the Act, no other court of appeals has considered a case involving a similar set of facts, which the court of appeals found crucial in this case. The court below distinguished factual circumstances similar to those

in cases that have arisen in other circuits, in which the employees were held to be covered under the Act. For those reasons, and because the impact of the court's decision is uncertain, review of the court of appeals' "loading and unloading" test is not warranted at this time.

1. As discussed above, a land-based claimant like petitioner who sustains a work-related injury on a maritime "situs" is covered by the LHWCA only if he or she also has the "status" of a "person engaged in maritime employment," which the Act defines as "including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker." 33 U.S.C. 902(3). By using the term "including," Congress indicated that "maritime employment" is not limited to the specifically mentioned occupations. *Herb's Welding, Inc.* v. *Gray*, 470 U.S. 414, 423 n.9 (1985); see also *Chesapeake & O. Ry.* v. *Schwalb*, 493 U.S. 40, 45 (1989).

The court of appeals placed great reliance on this Court's statement in *Schwalb* that, "aside from the specified occupations, land-based activity occurring within the § 903 situs will be deemed maritime only if it is an integral or essential part of loading or unloading a vessel." 493 U.S. at 45. That statement in *Schwalb* must be understood, however, in the context of this Court's cases applying an "integral or essential part" test, all of which involved cargo-related operations. Thus, the Court has held that land-based workers involved in "some portion" of the overall "process of loading or unloading a ship" are engaged in "maritime employment," *P.C. Pfeiffer Co.* v. *Ford*, 444 U.S. 69, 82-83 (1979); *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 265-279 (1977),

whether the worker is checking and marking cargo, as in *Caputo*, moving cargo, as in *Pfeiffer*, or maintaining and repairing equipment essential to the loading or unloading process, as in *Schwalb*, 493 U.S. at 47.

The Court has not been presented with a case involving land-based activity that was "integral or essential" to another occupation specified in the Act, such as shipbuilding or ship repair, but not longshoring.[3] The Act itself, however, does not confine coverage to longshore workers; it provides coverage equally to "any harbor-worker including a ship repairman, shipbuilder, and ship-breaker." 33 U.S.C. 902(3). If, as the Court held in *Schwalb*, the Act extends coverage to work that is essential to longshore operations, but is not longshoring itself, there is no reason to doubt that the Act also covers employment that is essential to other activities specified in the Act, such as shipbuilding and ship repair.

This Court's understanding of the purpose of the 1972 amendments to the LHWCA also supports a finding of coverage when a land-based activity is essential to shipbuilding or ship repair. As the Court

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[3] The Court has indicated, however, that the LHWCA covers work connected to maritime employment other than longshoring. See *Herb's Welding*, 470 U.S. at 423-424 ("maritime employment" requirement cannot "be read to eliminate any requirement of a connection with the loading *or construction* of ships") (emphasis added); *Pfeiffer*, 444 U.S. at 80 (stating that Congress adopted "an occupational test that focuses on loading and unloading," but also recognizing that "[l]and-based workers who do not handle containerized cargo also may be engaged in loading, unloading, *repairing, or building* a vessel") (emphasis added).

has recognized, one of the "primary motivations" for extension of the LHWCA to land-based workers in 1972 was Congress's recognition that much work once performed on vessels on the navigable waters is now performed on land. *Caputo*, 432 U.S. at 269-270. Congress intended to reach such work, *id.* at 270-271, and "anticipated that some persons who work only on land would receive benefits." *Pfeiffer*, 444 U.S. at 80. Shipbuilding and ship repair, like longshoring, now occur on both sea and land. Employment Standards Admin., U.S. Dep't of Labor, *LHWCA Program Memorandum No. 58: Guidelines for Determination of Coverage of Claims Under Amended Longshoremen's Act* 4 (Aug. 10, 1977); see also *Pfeiffer*, 440 U.S. at 80; *Dravo Corp.* v. *Maxin*, 545 F.2d 374, 380-381 (3d Cir. 1976), cert. denied, 433 U.S. 908 (1977); National Research Council, *Personnel Requirements for an Advanced Shipyard Technology* 38 (1980). Coverage of all land-based employees whose work is essential to shipbuilding and ship repair ensures that workers in those industries, like those in longshoring, will not lose LHWCA benefits merely because of technological changes in their industries.

The court of appeals erred by considering only whether a land-based worker whose occupation is not specifically listed in 33 U.S.C. 902(3) did work that was integral to "loading or unloading." The proper test would consider whether the claimant's activities were integral or essential to any of the activities specified in Section 902(3), including shipbuilding and ship repair; under that test, the court of appeals should have concluded that petitioner was engaged in maritime employment. Unlike the welder in *Herb's Welding*, whose work was essential to offshore oil drilling, but not to any occupation mentioned in the

Act's definition of maritime employment, see 470 U.S. at 422 (offshore oil drilling is not itself "a maritime activity"), petitioner did work that was essential to activities that were part of "maritime employment" under 33 U.S.C. 902(3). See Pet. App. 20a-21a ("without electricity and steam no shipbuilding and repair work can be performed"). It should also make no difference that petitioner was engaged "only [in] the *construction* of a power plant (as distinguished from its later operation or maintenance)," as the court of appeals believed, *id.* at 8a (court's emphasis), as demonstrated by the fact that, in this case, the plant under construction was intended to replace an existing one. *Id.* at 17a.

2. Notwithstanding the court of appeals' errors, review is not warranted in this case. Contrary to petitioner's argument (Pet. 6, 13-15), the court of appeals' decision is not in direct conflict with the holding of *Schwalb*. *Schwalb* held that persons who maintained and repaired loading equipment were engaged in maritime employment because their work was an essential part of the loading and unloading process. 493 U.S. at 47. The Court did not consider the precise question presented in this case: whether work essential to shipbuilding and ship repair is also covered.

Although petitioner argues (Pet. 16-20) that the decision below conflicts with decisions of other courts of appeals, this case is the first one after *Herb's Welding* and *Schwalb* in which a court of appeals has had to decide whether a claimant is engaged in maritime employment when his or her work is "essential" to shipbuilding or ship repair work, but not longshoring. Other courts of appeals have had no occasion to consider the Fourth Circuit's

conclusion that *Herb's Welding* and *Schwalb* require use of a "loading or unloading" test to exclude such workers from coverage.

Moreover, although decisions of other courts of appeals predating *Herb's Welding* and *Schwalb* do take a broader view of the Act's coverage than did the court below in this case, the facts of those cases are sufficiently distinct from the facts of this case that the court below might have found coverage in those circumstances. In *Graziano* v. *General Dynamics Corp.*, 663 F.2d 340, 343 (1981), the First Circuit held that an employee who maintained and repaired shipyard buildings and equipment was engaged in maritime employment because his duties were essential to the construction and repair of ships. The Fourth Circuit might well find coverage for someone in Graziano's position, however, because it characterized the issue in this case as whether a pipefitter "employed in only the *construction* of a power plant (as distinguished from its later operation or maintenance)" met the status requirement. Pet. App. 8a (court's emphasis). Thus, the court below essentially distinguished the facts of *Graziano*. It is also conceivable that the First Circuit would find that construction work on a power plant is not comparable to Graziano's duties, which that court viewed as "a necessary link in the chain of work that resulted in ships being built and repaired." 663 F.2d at 343.[4] Although we do not believe that a distinction

[4] Third Circuit decisions appear to support such a distinction. Compare *Dravo Corp.* v. *Maxin*, 545 F.2d at 380 (burning steel plates to be used in shipbuilding is an "integral part" of such employment) with *Dravo Corp.* v. *Banks*, 567 F.2d 593, 595 (3d Cir. 1977) (routine maintenance work at a shipyard is not an "integral part" of shipbuilding).

between construction and repair is ultimately supportable (see p. 10, *supra*), the courts of appeals have not considered that issue since *Schwalb*.[5]

There is also no direct conflict between the decision below and *Hullinghorst Industries* v. *Carroll*, 650 F.2d 750 (5th Cir. 1981), cert. denied, 454 U.S. 1163 (1982), as petitioner contends (Pet. 18-19). In that case, the Fifth Circuit held that a carpenter erecting a scaffold on a pier for use in repairing longshoring equipment was engaged in maritime employment because "[i]t was an integral step in a maritime project of the type that could be performed by a typical harborworker," and "directly furthered the maritime goals of the [relevant] port facility—the loading and unloading of ships." 650 F.2d at 756; see also *Schwalb*, 493 U.S. at 44 (citing *Hullinghorst* as a case in which maintenance and repair were found to be essential to loading and unloading). Because *Hullinghorst* involved work essential to longshoring, the Fourth Circuit would likely have found coverage on the same facts.[6]

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[5] In cases involving an alleged connection to loading and unloading, courts of appeals have construed *Herb's Welding* and *Schwalb* to require a land-based worker whose occupation is not listed in 33 U.S.C. 902(3) to show that his or her work is essential to loading or unloading. See *Munguia* v. *Chevron U.S.A. Inc.*, 999 F.2d 808, 811 (5th Cir. 1993), cert. denied, 114 S. Ct. 1839 (1994); *Coloma* v. *Director, OWCP*, 897 F.2d 394, 398-400 (9th Cir.), cert. denied, 498 U.S. 818 (1990).

[6] Petitioner also argues (Pet. 20-31) that review is warranted because the Fourth Circuit's decision in this case conflicts with other decisions of the same court. "It is primarily the task of a Court of Appeals to reconcile its internal difficulties." *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957). Moreover, it may be possible for the court of appeals to reconcile the decisions cited by petitioner. For

3. The impact of the decision below on LHWCA enforcement is also too uncertain to warrant review at this time. The coverage question in this case arises in an unusual setting (a naval facility building its own power plant) and should directly affect few workers. It is not clear that the court's decision will control cases involving other occupations that are more directly connected to shipbuilding and ship repair. Moreover, the court distinguished "maintenance" of shipyard equipment from the construction at issue in this case. Pet. App. 8a. It is possible that the court of appeals will find maintenance workers to be "shipbuilders" or "harbor workers," and therefore specifically covered under the Act. See *LHWCA Program Memorandum, supra,* at 11-12 (ship repair workers and shipbuilders include "the many trades or crafts represented within the labor force of a shipyard [, and] * * * maintenance functions per-

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example, in *Brown & Root, Inc.* v. *Joyner*, 607 F.2d 1087 (4th Cir. 1979), cert. denied, 446 U.S. 981 (1980), coverage of employees engaged in the construction of a dry dock may have turned on the fact that a dry dock (unlike a power plant) "is peculiarly a maritime facility" that was a covered situs even before the 1972 amendments to the LHWCA. *Id.* at 1089; see *Director, OWCP* v. *Perini N. River Assocs.*, 459 U.S. 297, 323-324 (1983) (1972 amendments manifest "no congressional intent to affect adversely the pre-1972 coverage"). In *Pittman Mechanical Contractors, Inc.* v. *Director, OWCP*, 35 F.3d 122, 125-126 (4th Cir. 1994), the court distinguished the instant case and explained that the employee in that case was covered because his repair of pipelines that were the only means of transporting supplies essential to a ship's docking involved equipment necessary for the loading process. *Price* v. *Norfolk & Western Railway*, 618 F.2d 1059, 1061 (4th Cir. 1980), also involved an employee whose work related to loading and unloading of vessels.

formed on the machinery and equipment of the shipyard are indivisible in purpose from the use of the equipment"); see also *Brown & Root, Inc.* v. *Joyner*, 607 F.2d 1087, 1089, 1090 n.5 (4th Cir. 1979) (noting that Board includes certain maritime construction workers in definition of "harbor workers"), cert. denied, 446 U.S. 981 (1980). Therefore, although we believe that the court of appeals' decision is erroneous, review by this Court is not warranted at this time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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